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**Ex Parte Presentation**

Marlene H. Dortch
Secretary,
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *July 1, 2005 Annual Access Charge Tariff Filing*, WCB/Pricing No. 05-22**

Dear Ms. Dortch:

Iowa Telecommunications Services, Inc. and Valor Telecommunications of Texas, L.P., by its undersigned counsel, oppose the request by the eCommerce & Telecommunications User Group ("eTUG") and the Telecommunications Committee of the American Petroleum Institute ("API") for the Federal Communications Commission ("Commission") to adopt an interim X-factor of 5.3 percent for price cap carrier's interstate special access rates.[1]

Driven by the consistent and significant gains by alternative special access providers, the Commission has systematically relaxed the obligations placed on incumbent LECs' provision of special access services over the last fifteen years. In January, the Commission initiated a proceeding to evaluate and assess the current special access regime.[2] Based on the factual record to be developed in this proceeding, the Commission should continue its incremental deregulation of incumbent LEC special access services, in light of the significant continued development of a competitive special access market.

1 *Letter from Brian R. Moir to Marlene H. Dortch, Secretary, FCC*, WC Docket No. 05-25, WCB/Pricing Docket No. 05-22 (filed May 10, 2005) ("*eTUG/API Ex Parte*").

2 *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, FCC 05-18 (rel. Jan. 31, 2005) ("*Notice*")

eTUG/API, however, demands drastic and unprecedented interim action prior to the close of the comment cycle in this proceeding. The requested interim relief (the adoption of a 5.3 percent X-factor for special access services) has significant factual and legal deficiencies:[3]

> **Interim relief would violate the APA.** BellSouth has explained at length the significant procedural shortcomings of eTUG/API's request for interim relief.[4] Prior to the conclusion of the relevant comment cycle, eTUG/API maintains that the Commission can impose interim relief, consistent with the obligations of the Administrative Procedure Act ("APA"). This is untrue. Among other fundamental requirements, the APA requires agencies to provide a reasonable opportunity to participate in the rulemaking process *prior* to agency action.[5] No such opportunity has been provided in this instance.
>
> eTUG/API fails to offer a single instance in which an agency was permitted to adopt a solution prior to an opportunity for public comment.[6] While some deference may be given to an agency to craft interim solutions (after notice and comment), such deference is reserved for "act[ions] to maintain the status quo."[7] In stark contrast,

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3 eTUG/API's alternative relief – the postponement of the annual access filing – is a radical proposition that receives cursory treatment in the *ex parte* request. eTUG/API fails to provide any justification to support a serious disruption to the annual implementation of all price cap services pricing changes for an indeterminate amount of time. There is no precedent for such a drastic change to this annual process.

4 *Letter from Bennett L. Ross, General Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission,* WC Docket No. 05-25, WCB/Pricing Docket No. 05-22 (filed May 27, 2005) ("*BellSouth Ex Parte*").

5 *See* 5 U.S.C. § 533(c); *see also BellSouth Ex Parte* at 1-2.

6 *BellSouth Ex Parte* at 2; *see also Council of the Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 582 (D.C. Cir. 1981) ("limited nature of the rule cannot itself justify a failure to follow notice and comment procedures").

7 *See BellSouth Ex Parte* at 3 (quoting *MCI Telecommunications Corp v. FCC*, 750 F.2d 1135, 1138 (D.C. Cir. 1984)).

eTUG/API would have the Commission revert back to a 1995 policy that was long ago superseded.

**No interim relief is warranted.** Because special access rates are just and reasonable today, there is no need for interim relief. eTUG/API relies exclusively on accounting rate of return data "for three of the four largest Price Cap LECs" to support its view that special access services are priced at "excessive levels."[8] ARMIS reports and accounting rate of return data were never intended to serve a ratemaking purpose, and both Verizon and SBC have previously refuted this use of ARMIS data. In addition, eTUG/API relies exclusively on allegations that the Bell Operating Companies' returns are excessive, yet seeks a remedy that would apply to *all* price cap carriers. There is no evidence presented by eTUG/API to support the view that small and mid-sized price cap carriers have excessive special access returns. Price cap policies must reflect the market realities and operating conditions of all price cap carriers, not just three of the four largest.

**Proposed interim relief is inconsistent with the *CALLS* regime.** eTUG/API asserts that "the Commission never intended the special access X-Factor to remain equal to GDP-PI after the CALLS Plan expired."[9] To the contrary, the Commission's *Notice* and Rules strongly suggest otherwise. As a threshold matter, there is no need for an interim solution, because the Commission's notice clearly states that *CALLS* "will continue after this date until the Commission adopts a subsequent plan."[10] Moreover, under *CALLS,* the X-factor for special access services *starting in 2004* is set equal to GDP-PI; the Commission rules in no way limits the *CALLS* X-factor to the original term of *CALLS*.[11]

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8 *eTUG/API Ex Parte* at 3.

9 *Id.*

10 *Notice*, ¶ 2.

11 47 C.F.R. § 61.45(b)(1)(iv) ("*Starting* in the 2004 annual filing, X shall be equal to GDP-PI for the special access basket.") (emphasis added).

What is more, the Commission's description of the post-*CALLS* regime is directly contrary to the type of regressive relief suggested by eTUG/API. Specifically, the Commission stated in *CALLS* that "we envision that the Commission will conduct a proceeding to determine whether and to what degree it can deregulate price cap LECs" at the end of *CALLS*.[12] The interim relief would be also an unjustified departure from the policy determination underlying the *CALLS* X-factor. Under *CALLS*, the controversial productivity-based X-factor was replaced with a limited transitional mechanism to reduce rates for a specified period of time. In order to encourage the investment and development of special access services across the country, the *CALLS* Coalition proposed – and the Commission adopted – the elimination of any further reductions in special access rates after 2003 in order to "encourage additional investment in those areas remaining under price caps," *i.e.*, areas not subject to pricing flexibility.[13] The continued need for investment in these areas weighs in favor of the Commission's maintaining the current regulatory structure, and eTUG/API offers no explanation as to why *CALLS* should not continue until it is formally replaced (or extended) at the conclusion of this proceeding.

**A 5.3 percent X-factor is invalid.** eTUG/API contends that "[s]etting the X-Factor at 5.3 percent on an interim basis is fully justified," relying upon the fact that it "was the last X-Factor upheld by the courts."[14] This is a gross distortion of the Commission's 1995 X-factor(s) and the explicit findings of the U.S. Court of Appeals.[15] The Commission's *1995 Price Cap Review* refused to adopt a new X-factor in 1995 because "there [was] an insufficient record to

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12 *CALLS*, ¶ 36.

13 *Ex Parte Presentation of the CALLS Coalition*, CC Docket No. 94-1, at 15 (Mar. 8, 2000).

14 *Notice* at 3.

15 *See, e.g., Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd 8961 (1995) ("*1995 Price Cap Review*"); *Bell Atlantic Telephone Companies v. Federal Communications Commission*, 79 F.3d 1195 (D.C. Cir. 1996) ("*Bell Atlantic Tel*").

choose a long-term methodology for computing the X-Factor."[16] Rather, the Commission established three interim X-factors for the "1995 annual access tariff filings," based on pre-price cap (pre-1990) data.[17] Specifically, the Commission adopted a "minimum X-Factor of 4.0 percent and two optional X-Factors of 4.7 and 5.3 percent."[18] Carriers could select any of the three X-factors (each X-factor had specific low-end adjustment/sharing obligations). The Court only found that the "Commission reasonably decided to continue the present system during the interim period," and approved the X-factors as a reasonable interim measure for 1995 – not 2005.[19] eTUG/API's efforts to cherry-pick the highest of three interim 1995 X-factors, derived from twenty-year old rate-of-return data, must be rejected.

**Interim relief would impair the development of a competitive special access market.** The imposition of an interim productivity factor – significantly higher than the current X-factor – on incumbent LEC special access rates would also adversely affect the competitive dynamic in the special access market. Price cap regulation is designed to replicate market conditions and serve as a transition to complete deregulation. However, the imposition of an unexpected and inconsistent flash cut reduction in special access rates for incumbent providers could potentially disrupt the development of market-based pricing and adversely affect the ability of competitive carriers to price and market their services.

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16 *1995 Price Cap Review*, ¶ 144; *Bell Atlantic Tel.*, 79 F.3d at 1200. (explaining that "the record … was insufficient to make a final or permanent determination about local exchange carrier productivity under price caps").

17 *Id.*

18 *1995 Price Cap Review*, ¶ 199.

19 *Bell Atlantic Tel.*, 79 F.3d at 1203.

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For the foregoing reasons, the Commission should reject eTUG/API's attempt to circumvent the Commission's procedural structures and impose interim requirements on incumbent LECs inconsistent with the actual conditions in the special access market.

Respectfully submitted,

*/s/Gregory J. Vogt*

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